

STATE OF MICHIGAN IN THE SUPREME COURT

IN RE: PETITION FOR ADMINISTRATIVE ORDER  
OR COURT RULE ESTABLISHING INACTIVE  
ASBESTOS DOCKETING SYSTEM

ADM. FILE NO 2003-47

**Respondents Goldberg, Persky & White Plaintiffs' Memorandum of Law in  
Opposition to Administrative Order No. 2006-6: Prohibition on "Bundling"  
Cases**

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## **EXECUTIVE SUMMARY**

Respondents represented by Goldberg, Persky & White, P.C., object to and oppose the Michigan Supreme Court's Administrative Order No. 2006-6 as being unnecessary, superfluous and contrary to Michigan Jurisprudence. Respondents believe that Michigan Trial Courts, in the appropriate exercise of their jurisdiction, have historically and will continue to take such steps in the management of asbestos cases so as to insure that the due process rights of all parties are protected.

The Wayne County Circuit Court, and other Courts handling asbestos cases in Michigan, have long utilized their inherent discretion to achieve a fair balance between judicial economy, eliminating the unnecessary duplication of resolving identical issues among and between asbestos cases and, at the same time, ensuring that the due process rights of Plaintiffs and Defendants alike are protected. The best and dispositive evidence that the Michigan Trial Courts have appropriately balanced judicial economy with the Due Process rights of the parties is that **less than 20%** of the Defendants involved in asbestos personal injury cases in Michigan have offered formal support of the Court's "Anti-Bundling" Order. (Of approximately 500 Defendants in Michigan asbestos litigation, only 92 have joined in Dickenson Wright's Memorandum of Law).

Denying or limiting the Trial Courts' inherent discretion to manage these dockets, through pre-trial consolidation and otherwise, would result in Michigan being the least efficient jurisdiction in the country for the handling of asbestos personal injury cases. The efficiencies that have been realized by the Trial Courts' exercise of its inherent

discretion are born out by the fact that the last asbestos personal injury verdict in Michigan occurred over seven years ago. Inasmuch as Michigan law, as with the law of all jurisdictions, favors settlement, it is clear that Michigan Trial Courts have been appropriately exercising their discretion, achieving judicial economy while at the same time protecting the due process rights of all parties.

### **Enactment of Anti-Consolidation and “Anti-Bundling” Rules is Unnecessary**

#### **A. The Michigan Supreme Court’s “Anti-Bundling” Administrative Order is Unnecessary—“bundling” simply does not occur in Michigan asbestos personal injury cases.**

This Court’s August 9, 2006 Order (ADM File No 2003-47), namely Administrative Order No. 2006-6, states in part: “It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases.” As was made clear to this Honorable Court at the most recent public hearing regarding proposed Administrative Order No. 2003-47, “bundling” as defined by this Court simply does not occur in the prosecution and resolution of asbestos personal injury cases in Michigan. The Court will recall that Attorney Neil McCallum, representing many Defendants in Michigan asbestos personal injury litigation, was questioned closely by several of the justices regarding whether or not “bundling” occurs. Mr. McCallum clearly stated that “bundling”, as defined by the Court, simply does not occur in the resolution of asbestos personal injury cases. Rather, as Attorney McCallum made clear to this Court, each case

is resolved “on its own merits”, and specifically, these cases are not resolved “in conjunction with other cases” as this Honorable Court’s Order assumes.

Simply stated, there is absolutely no evidence before this Court that “bundling” as defined by this Court even occurs in the prosecution and resolution of asbestos personal injury cases in Michigan. Respondents’ undersigned counsel strongly objects to this Honorable Court’s conclusion, in the absence of any factual record, that such “bundling” occurs in Michigan. Respondents’ counsel, as well as counsel for each and every Defendant, has an absolute ethical duty to represent each of their clients zealously and independently. The predicate for this Honorable Court’s Rule simply does not exist. All parties involved in asbestos personal injury litigation would be in breach of their ethical duties of zealous representation their clients if such “bundling” occurred.

To the extent that the activity this Court seeks to curtail, namely “bundling”, simply does not occur, the Administrative Order is not only unnecessary and redundant but also predicated on a fallacy.

## **B. Michigan Courts Favor Settlements**

Michigan law, as with the law of every other jurisdiction in the United States, “favors settlement.” *Stefanac v. Cranbrooke Educational Community*, 435 Mich. 155, 458 N.W. 2d 56, 60 (Mich. S. Ct. 1990). Moreover, in Michigan, as with other jurisdictions: “[P]ublic and judicial policies favor settlement”. *Steele v. Wilson*, 29 Mich. App. 388, 185, N.W. 2d 417, 420 (Mich. App. 1971). In fact, Michigan has established Mediation Rules: “to expedite and simplify the final settlement of cases”.

Lincoln v. Gupta, 142 Mich. App. 615, 631; 320 N.W. 2d 212 (1985). The mediation rules are: “[D]esigned to favor settlements before a trial has been held, and to relieve parties, who are willing to settle for a fair amount, of the burden of trial.” Zalut v. Anderson & Associates, 186 Mich. App. 229, 463 N.W. 2d 236, 238 (Mich. App. 1990).

The Dickinson Wright Petitioners and members of this Honorable Court have noted that the last asbestos personal injury case tried to verdict in the state of Michigan occurred over seven years ago. Respondents estimate that, in the meantime, several thousand asbestos personal injury cases have been filed, prosecuted and resolved via settlement. As Respondents have contended before this Court previously, the track record of achieving settlements in asbestos cases in Michigan indicates **NOT** that something is wrong with the way in which the Trial Courts exercise discretion, but rather that the Trial Courts in Michigan have appropriately exercised said discretion with the result being settlement of several thousand asbestos cases, which if not settled, would invariably have placed an enormous burden on the judicial resources of Michigan.

Thus, the Trial Courts in Michigan, in the exercise of their inherent discretion, have succeeded in achieving judicial economy, while at the same time protecting all parties’ Due Process rights.

**C. All Parties’ Due Process Rights are Protected by the Trial Courts’ Exercise of Discretion Pursuant to Michigan Law.**

As a general proposition: “[T]he Trial Court has the duty to assure that the parties before it receive a fair trial.” Reetz v. Kingsman Marine Transit Co., 316 Mich. 97, 103

N. 9, 330 N.W. 2d 638 (Mich. 1982). As such, the Trial Court is duty bound to ensure that any procedures utilized result in fairness to all parties. Simply stated: “Indeed, the Trial Court has both the duty and the discretion to fashion procedures that ensure fairness to all of the litigants in these situations.” Hashem v. Les Stanford Oldsmobile, Inc., 266 Mich. App. 61, 86, 697 N.W.2d 558, 573 (Mich. App. 2005).

In Michigan, the Trial Courts have been faced with a significant number of asbestos personal injury cases. While the number of asbestos personal injury cases pending at any one time in the state of Michigan has never historically exceeded approximately 3,000, and while similar jurisdictions such as Ohio and Illinois have tens of thousands of asbestos personal injury cases pending, Respondents respectfully submit that several thousand asbestos personal injury cases is a significant number for any state court system.

In order to address some of the difficulties inherent in asbestos personal injury cases with the view toward both increasing judicial economy and ensuring Due Process for all parties, the Wayne County Circuit Court established the Wayne County Circuit Court Steering Committee made up of members of both the Plaintiffs and Defense Bar in asbestos litigation in Michigan. The Case Management Orders at first established, and, with the passage of time, refined and maintained, processes and procedures which protect the Due Process rights of all parties, reduce the amount being spent by all parties, most importantly Defendants, on “transactional costs” (costs incurred in defending these lawsuits) and to avoid the unnecessary duplication of proofs. The Case



Management Orders entered by the Wayne County Circuit Court, (the Honorable Robert Colombo Jr.) have been adopted by nearly every other Circuit Court in Michigan where asbestos personal injury actions are pending. These Case Management Orders are refined from time to time to address changing conditions. At all times, however, the Trial Court, in the appropriate exercise of its inherent jurisdiction, has discharged its duty to formulate procedures that ensure that the Due Process rights of all parties are protected.

Respondents object strongly to this “Administrative Order” because it ignores the painstaking and diligent efforts of the Trial Courts of Michigan, who have worked tirelessly to formulate procedures and processes to protect the rights of all parties. In addition, the Administrative Order here suggests that the Due Process rights of all parties, Defendants and Plaintiffs alike, have not historically been diligently preserved and protected by the Trial Courts’ exercise of its inherent discretion. This is just wrong.

In this regard, it again warrants mention that less than 20% of all Defendants in asbestos litigation in Michigan support Administrative Order 2006-6. The fact that the vast majority of asbestos Defendants in Michigan have declined to join in the Dickinson Wright Memorandum certainly gives rise to the reasonable inference that the majority of Defendants believe that the Trial Courts in Michigan are painstakingly, tirelessly, and diligently exercising their discretion to balance the needs of judicial economy, the avoidance of unnecessary, repetitive proof, with the protection of all parties’ Due Process

rights, with the result being that a vast majority of asbestos cases are resolved prior to trial.

### **CONCLUSION**

Respondents respectfully suggest that the predicate for Administrative Order 2006-6 is fallacy. Respondents' undersigned counsel, as well as certain defense attorneys who have addressed this Honorable Court, have stated that "bundling" as defined by this Court, simply does not occur. Such "bundling" of asbestos personal injury cases, with respect to Plaintiffs and defense counsel alike, would violate each attorney's absolute duty to zealously and independently represent each client. Thus, the "need for immediate action" this Honorable Court has found is premised on a fallacy.

Moreover, the procedures and processes historically used in handling asbestos personal injury cases by Trial Courts in Michigan, primarily by The Honorable Robert J. Colombo, Jr. in Wayne County Circuit Court, were established in a sound exercise of the Court's inherent discretion and have resulted in approximately 99.9% of asbestos personal injury cases being resolved prior to trial in the last seven years. To the extent that Michigan law favors settlement, the procedures utilized by the Michigan Trial Courts have obviously been successful in furthering that public policy.

Finally, the Trial Courts have the inherent discretion and also the ultimate duty to employ such rules and procedures to ensure that the Due Process rights of all parties are protected, while at the same time avoiding the unnecessary and duplicative consumption of judicial resources. Respondents respectfully submit that instead of denying the Trial

Courts the very discretion they have so effectively utilized in the last seven years in managing asbestos dockets, this Honorable Court should commend those Trial Courts for having developed a system that is inherently fair to all parties, reduces transactional costs to those parties and reduces the amount of judicial resources required to resolve these cases.

Respectfully Submitted,

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